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In The

Supreme Court of the United States

October Term, 1963

No. 729

Keith Wilson, Jeanne Wilson, Earl Dew, Helen Dew, Philip Hendrickson, Dorothy Hendrickson, Howard Speyer, Gladys Speyer, Richard Eriksen, Sydney K. Magee, Mabel Magee, Jackson Hartman, Fern Hartman, Ralph J. Moore, Jr., Annabel Moore, Clarence E. Rowley, Marguerite Rowley, Dorothy Jenssen, Arnold Eriksen, Samuel E. Eichman, Ida E. Eichman, Marilyn Toms, Dale Toms, Allan C. Foster, Ross Harris, Ruth M. Harris, Elsie D. Bender, William H. Beamer, Frederick A. Boardman, Dora Boardman, Rollen G. Engler, Fern Engler, Robert B. Bowlin, Betty Bowlin, Bernice Butler, Millard Lake, Florence Lake, William R. Engler, Ralph C. Girkins, Wallace Evans, Nancy Evans, Adah Beamer, Lilian J. Engler, Fred Slagle, Howard Price, Ethel C. Price, Helen Burbage, Eleanor Burbage, and Robert L. Hinds,

Petitioners,

vs.

Washington Congregational Church,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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1304 Toledo Trust Building
Toledo 4, Ohio
Attorney for Petitioners

THE WEST TOLEDO PUBLISHING CO., INC.

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Toledo 4, Ohio
Attorney for Petitioners

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio made and entered by said Court on the 9th day of October, 1963 (Appendix A hereto, p. 19), and respectfully show this Honorable Court:

Opinions of the Courts Below

No opinion was rendered by the trial court. A copy of the judgment entered by the trial court making findings of fact and conclusions of law is attached hereto as Appendix B (p. 21).

Said judgment was affirmed by the Court of Appeals of Lucas County, Ohio, without opinion. A copy of the judgment entered by said appellate court is attached hereto as Appendix C (p. 27).

A Motion to Certify the Record was overruled by the Supreme Court of Ohio on the 9th day of October, 1963, without opinion. A copy of said judgment is attached hereto as Appendix D (p. 29).

An Appeal as of Right to the Supreme Court of Ohio, raising the federal constitutional question, was dismissed by said Court on the 9th day of October, 1963, without opinion. A copy of said order and judgment dismissing said Appeal is attached hereto as Appendix A (p. 19).

Jurisdiction

The date of the judgment sought to be reviewed was dated and entered the 9th day of October, 1963. By this judgment the Supreme Court of Ohio dismissed the Appeal as of Right based on the constitutional question presented by this Petition. There was no order respecting a rehearing, and there was no order granting an extension of time within which to petition for certiorari.

The case involves a denial of due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States by the application of two cases decided in the State of New York as res judicata, although there is no common party and no common issue.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the Supreme Court of Ohio is United States Code, Title 28, Section 1257 (3).

Question Presented

Is it a denial of due process of law to apply a judgment of another state as res judicata where there is no common party and no common issue?

Constitutional Provisions Involved

The Fifth Amendment to the Constitution of the United States provides, so far as material:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides, so fas as material:

> "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Statement of the Case

This action was brought in the Common Pleas Court of Lucas County, Ohio, to set aside and vacate a purported vote of the defendant Congregational Church to join a new denomination known as the United Church of Christ. The Petition alleged that such a vote involved matters of fundamental and traditional doctrine of faith, dogma, and procedures and constituted a departure from those heretofore held and followed by the defendant church and would deprive the plaintiffs, as a faithful minority, of their rights in the property and assets of the defendant church under the Constitution of the United States and the laws and Constitution of the State of Ohio.

The Common Pleas Court granted a Motion for Summary Judgment because, as found by the trial court, the issue of "departure" had been decided adversely to the plaintiffs in an action entitled *Cadman Memorial Church v. Helen Kenyon*, 306 N.Y. 151, 116 N.E. (2) 481 (1953), referred to below as "Cadman," and in an action entitled *First Congregational Church and Society of Burlington, Iowa, et al. v. Evangelical and Reformed Church, et al.* (2d Circ.), 305 Fed. (2) 724, cert. den. Feb. 18, 1963, hereinafter referred to as "Mayfair."

The federal question was raised in the trial court by Paragraph 12 of plaintiffs' Petition, a copy of which is appended hereto as Appendix E.

The constitutional question was raised by the Assignment of Errors in the said Court of Appeals for Lucas County, Ohio, and argued by brief, and in the Supreme Court of Ohio by an Appeal as of Right based on said constitutional question.

The judgment of the trial court became final when the Supreme Court overruled the Motion to Certify and dismissed the Appeal as of Right raising the constitutional question.

Background of Controversy

This action arose out of a purported vote of the defendant congregational church to become a local church of the United Church of Christ, a new denomination formed under a constitution adopted in July, 1961.

The question involved is whether this constituted a change from a congregational-type polity to a presbyterian-type polity. If it did, a faithful minority are entitled to the continued use of the church property. 47 Ohio Jur. (2) 296, Religious Societies, Sec. 20; 45 Am. Jur. 764, Religious Societies, Sec. 55; 76 C.J.S. 848, Religious Societies, Sec. 70.

The basic differences between a congregational-type polity and a presbyterian-type polity have been recognized in American Jurisprudence since they were defined by the Supreme Court of the United States in *Watson v. Jones*, 13 Wall. (U.S.) 679, 20 L. Ed. 666 (1872).

Under the congregational-type polity each church is an individual, autonomous church, subject to no other or higher ecclesiastical body. Thus, the defendant congregational church was associated only "in fellowship" with associations and conferences which had been created by local churches with limited powers only. The churches collectively were known as "The Congregational Christian Churches of the United States" and, although sometimes referred to as a denomination to distinguish them from other religious groups, it was not a denomination in the sense of a national, centrally-controlled, creedal church or denomination. The General Council of the Congregational Christian Churches was created by the local churches only as a national advisory agency, serving the entire fellowship, but without any supervisory authority or control over any local church.

On the other hand, the Evangelical & Reformed Church was, and is, a national, incorporated, monolithic church, having an overhead or central government known as the General Synod, with legislative, judicial, administrative and ecclesiastical functions and powers over every local church of that denomination.

The General Synod of the United Church of Christ was organized under the Constitution adopted in 1961 to take over and merge the assets and most of the functions of the General Council of Congregational Christian Churches and the assets and most of the functions of the General Synod of the Evangelical & Reformed Church.

Since the General Synod of the Evangelical & Reformed Church exercised complete ecclesiastical authority and control over every local church of that denomination, all former E. & R. Churches were made local churches of the United Church of Christ by fiat.

However, local Congregational Christian Churches, being wholly autonomous and not subject to any higher or other ecclesiastical body, were required to vote to become a part of the United Church. If a change from a congregational polity to a presbyterian polity is involved, a faithful minority is entitled to the continued use of the church property as a congregational church. By applying the *Cadman* and *Manfair* cases as res judicata, the trial court precluded a trial of this question.

The defendant church is an Ohio, non profit corporation with a written Constitution which provides in Article II that it is "amenable to no other ecclesiastical body." This provision, defining the polity of the defendant church, has not been involved in any prior case.

As shown below, the application of the *Cadman* and *Manfair* cases as res judicata in the case at bar is without precedent and is contrary to sound legal analysis.

1. Proceedings in Cadman Case

This action was brought in the Supreme Court of New York to secure a declaratory judgment that the General Council of the Congregational Christian Churches had no authority to consummate a proposed union of Congregational Christian Churches with the Evangelical & Reformed Church, to restrain the General Council from merging its assets with those of the General Synod of the E. & R. Church, and for other relief. The trial judge entered a judgment in favor of the plaintiffs for substantially all the relief prayed for (197 Misc. 125, 95 N.Y.S. (2) 133).

The Appellate Division reversed the trial court and *dismissed both the plaintiff's complaint and the defendant's counterclaim* on the ground that the trial court did not have jurisdiction over indispensible parties, stating, "A court may and ordinarily must refuse to render a declaratory judgment in the absence of such parties." (279 App. Div. 1013, 111 N.Y.S. (2) 808). In a subsequent Memorandum of Decision dated May 5, 1952, the Appellate Division stated, "The civil courts do not interfere with ecclesiastical matters in which temporal rights are not involved. . . . *This court has not considered and has made no consideration upon the questions of fact arising upon the issues as to such ecclesiastical matters;*" (279 App. Div. 1074). Thus the court obviously did not decide any question of polity.

The Court of Appeals of New York affirmed the Appellate Division in December of 1953, stating in its opinion, "Under these circumstances no ecclesiastical question is presented," and in the dissenting opinion it is stated, "We are all in accord that there is no ecclesiastical question in this case," (306 N.Y. 151, 116 NE (2) 481, 488).

Thus, *Cadman* decided only that there were indispensible parties not before the court and that the plaintiffs in that action had no property rights in the assets of the General Council which would permit the decision of any ecclesiastical question.

Cadman is not applicable to any issue in the case at bar because: (a) it did not involve a local church voting to join the United Church; (b) it did not decide any ecclesiastical question and specifically did not decide the question of "departure;" (c) it was decided in 1953 and the Constitution of the United Church was not adopted until July, 1961; (d)

none of the plaintiffs in the case at bar were parties to that action, participated therein, or controlled that litigation; and (c) none of the provisions of the Washington Church Constitution or the Constitution of the United Church were considered or involved in *Cadman* which would have been necessary to determine the issue of departure in the case at bar.

It is submitted that the application of *Cadman* as res judicata in the case at bar cannot be supported by sound legal analysis and is without precedent or authority in law.

2. Proceedings in Mayfair Case

The *Mayfair* case was decided by the Second Circuit Court of Appeals on August 1, 1963 (305 F. (2) 724). Certiorari was denied by the Supreme Court on February 18, 1963 (No. 705; October term, 1962). This case brought in as parties defendant those who were deemed "indispensible" parties in *Cadman*.

There was no trial on the merits in the District Court, and the hearing was conducted under pre-trial practice; no witnesses testified, no evidence was permitted, except the *Cadman* record, and the only issue was whether the *Cadman* case was applicable in *Mayfair* as res judicata. The trial judge held it was, but stated: "The consideration of the merits of the controversy between the parties has not been reached in this court." (198 F. Supp. 677).

On appeal the Second Circuit Court of Appeals in *Mayfair* held (1) that *Cadman* was a class action; (2) that the plaintiffs in *Mayfair* are members of the same class and

were adequately represented by the plaintiffs in *Cadman;* (3) that no legal issue was raised in *Mayfair* which was not decided in *Cadman;* and (4) that the issues decided in *Cadman* were: (a) the General Council had the legal right under its Constitution to merge its assets with those of the General Synod of the E. & R. Church, and (b) that no ecclesiastical question was decided in *Cadman.*

The document under consideration in *Cadman* was the so-called *Basis of Union,* and the Circuit Court of Appeals in *Mayfair* couldn't tell whether the New York Court of Appeals in *Cadman* upheld the Basis of Union on the merits or found that it was beyond the jurisdiction of the court to question its invalidity. Thus, in a footnote (305 F. (2) 724, 729) the Court says:

> "While it is not wholly clear from the Court of Appeals decision whether it upheld the Basis of Union on the merits or because the question of its invalidity was beyond the cognizance of the civil courts, it would make no difference to resolution of the issues presented here which of these grounds of decision was in fact adopted."

Thus, if the U. S. Circuit Court in *Mayfair* couldn't tell whether the Basis of Union had been approved in *Cadman* on the merits, the Circuit Court in *Mayfair* obviously did not hold that *Cadman* decided the issue of departure.

In other words, the plaintiffs in *Mayfair,* as well as the plaintiffs in *Cadman,* could not show a property interest in the assets of the General Council. Under New York law there can be no decision of an ecclesiastical question unless property rights are involved.

Neither *Cadman* nor *Mayfair*, therefore, decided that it was not a departure for a local church to join the United Church under the Constitution adopted in 1961. That question was not involved in either case. Nor was the provision of Article II of defendant's Constitution that it is "amenable to no other ecclesiastical body" involved or considered in those cases.

And, whereas the Federal Court in *Mayfair* was bound to follow the *Cadman* decision as to the property rights of the plaintiffs in the assets of the General Council, that limitation isn't present in the case at bar.

The Importance of the Case

Prior to the so-called merger there were approximately 5800 churches located throughout the United States and over one and a quarter million members comprising the historic Congregational Christian Churches of the United States. There are approximately 350 such churches in Ohio with approximately 90,000 members, according to the 1960 Yearbook.

There are still approximately 1200 Congregational Christian Churches which have failed or refused to become a part of the United Church, according to unofficial figures shown in the 1963 Yearbook of the United Church.

The importance and significance of the case at bar is, that if *Cadman* and *Mayfair* are applicable as res judicata in this case, they are also applicable as res judicata on the departure issue in every one of the remaining 1200 Congregational Churches which are still confronted with the

merger issue. Based upon the facts before this Court, it is reasonable to infer that in every instance where a vote has been taken it has been represented to the congregation that the departure issue was settled in *Cadman* and *Mayfair* for all churches, and in any event, wherever a faithful minority has raised its ugly head the defense of res judicata based on the New York cases has been asserted. See *Berkau, et al. v. Mayflower Congregational Church*, Case No. 611-604, pending on the Docket of the Circuit Court of Wayne County, Michigan, Appendix F (p. 38).

It is indeed anomalous if the reversal of the trial court in *Cadman* for the technical reasons converts that case to a judgment on the merits for the relief prayed for in the Cross-Complaint which was *expressly dismissed* by the appellate courts, or decides the departure issue here.

Under date of November 20, 1963, the General Council of the Congregational Christian Churches, (supposedly merged into the General Synod of the United Church), issued a bulletin over the signature of its Secretary which states that the decision of the Supreme Court of Ohio dismissing the Appeal in the case at bar had become final, and further:

> "The complaint had contended that the United Church of Christ was a departure from congregationalism and that the action of the church in voting to become a part of the United Church deprived the plaintiffs, who claimed to be a 'faithful minority,' of their rights in the property and assets of the church. . . . No one can now conscientiously contend that there are any legal uncertainties as to the validity of the Basis of Union and the Constitution, or that a church will lose its traditional congregational autonomy by joining the United Church."

Neither *Cadman* nor *Mayfair* justifies any such statement. Yet the statement shows the kind of representation being made on the basis of the Summary Judgment below applying the New York cases as res judicata.

1. The Decision Below Is In Conflict With Applicable Decisions of the Supreme Court and Has Deprived Petitioners of Their Constitutional Rights of Due Process.

As shown above, the judgment of the trial court in *Cadman* granted the plaintiffs substantially all the relief prayed for but was reversed by the Appellate Division (2-1) because there were indispensible parties not before the court and the plaintiffs had failed to show any property rights in the assets of the General Council. This judgment of reversal was affirmed by the New York Court of Appeals (4-2).

This was not a judgment "on the merits" on the issue of departure of a local church seeking to join the United Church and this Court has firmly adhered to the rule that a judgment rendered on any grounds which do not involve the merits of the action may not be used as a basis for operation of the doctrine of res judicata. *Swift v. McPherson*, 232 U.S. 51, 58 L. Ed. 499, 34 S.C. 239; *Costello v. U.S.*, 365 U.S. 256, 286 (1961); *Murray v. Pocatello*, 226 U.S. 318, 323-4.

The decision in *Mayfair* was based on *Cadman* being res judicata of the issues raised in *Mayfair*. Therefore, *Mayfair* decided nothing that wasn't previously decided by *Cadman*. If these prior suits and the case at bar do not involve the

same claim, demand, and cause of action, the effect of res judicata should not be given to the prior judgments. *Meyers v. International Trust Co.*, 263 U.S. 64, 68 L. Ed. 165, 44 S. C. 86; *Mobile City v. Kimball*, 102 U.S. 691, 26 L. Ed. 38. In this respect, there must be not only identity of the subject matter but also of the cause of action. *Travel v. Delaware, etc. Railway*, 227 U.S. 434, 57 L. Ed. 586, 33 S. C. 274.

As shown in the following section, there is a *prima facie* denial of due process if a party sought to be bound by res judicata was not, in fact, a party or privy to the prior adjudication. *Postal Telegraph-Cable v. City of Newport*, 247 U.S. 463, 467; 62 L. Ed. 1215, 1221 (1918); *Hansberry v. Lee*, 311 U.S. 32, 85 L. Ed. 22, 61 S.C. 115 (1940).

In so far as the case at bar holds that *Cadman* and *Mayfair* have adjudicated the issue of departure for the defendant church, this case is in conflict with the decisions of this Court cited above.

2. Under Prior Decision of This Court It Is a Denial of Due Process of Law In Violation of the Fifth and Fourteenth Amendments to the Constitution of the United States to Enter a Summary Judgment Based on the Application of Prior Cases In Another State as Res Judicata When the Parties Are Neither the Same Nor In Privity and There Is No Common Issue.

In *Hansberry v. Lee*, 311 U.S. 32, 85 L. Ed. 22, 61 S.C. 115 (1940), supra, this Court held that it is a denial of due

process of law to make a judgment in a class suit conclusive on absent parties unless the evidence shows that the interests of the absent parties are identical with those of the parties to the action in order to insure that the interests of the absent parties had been adequately protected.

In the opinion of this Court in the *Hansberry* case, Mr. Justice Stone stated (311 U.S. 40):

> "State courts are free to attach the descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Western Life Indem. Co. v. Rupp*, 235 U.S. 261, 273, 59 L. Ed. 220, 224, 35 S.C. 37."

* * * * * * * * *

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obligation. . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is

of a class so constituted, may be deemed adequately to represent any other of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those who they are deemed to represent, does not afford that protection to absent parties which due process requires. . . ." (p. 45)

There is no evidence in the case at bar to show that the interests of the plaintiffs here are identical with those of the parties in *Cadman* and *Mayfair*. The defendant church, as pointed out above, is an Ohio non-profit corporation. It is a separate legal entity with a written constitution and as to it, the issue of departure arises under its constitution which was not involved in either *Cadman* or *Mayfair*. These are not rights which the plaintiffs in *Cadman* or *Mayfair* asserted or attempted to adjudicate, and *as to these rights* neither *Cadman* nor *Mayfair* is a class action. See: *International Order of Machinists v. Street*, 367 U.S. 774, 779, 793, 6 L. Ed. (2)1164, 1167, 1175, 81 S.C. 1803, 1805, 1812.

Furthermore, it is apparent upon the face of the pleadings here and from the opinions of the courts in the prior cases that the interests sought to be protected here are not the same as the interests which the parties in the prior cases litigated.

The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. *Postal Telegraph-Cable Co. v. City of Newport*, 247 U.S. 463, 62 L. Ed. 1215, 1221; *Pennoyer v. Neff*, 95 U.S. 714, 733; 24 L. Ed. 565, 572.

The application of *Cadman* and *Mayta* under the circumstances, on a motion for summary judgment, as res judicata is not sustained by any evidence and is a denial of due process of law as guaranteed by the Fifth and Fourteenth Amendments of the Federal Constitution.

The Legal Question Involved In This Case Is of Great and Far-Reaching Importance

The legal question presented here, narrowly stated, is whether a summary judgment must comply with the requirements of due process of law. In this case, prior decisions of a sister state were applied as res judicata without reference to the factors which make one case res judicata as to another, and obviously as an expedient method to dispose of a case that might be complicated or politically embarrassing. This is not due process of law.

Furthermore, there are approximately [illegible] remaining Congregational Churches still confronted with the merger issue. If *Cadman* and *Mayfair* are applicable as res judicata on the issue of departure in the case at bar, they would likewise be applicable on this issue in any subsequent case as to each of the remaining churches. Since there has never been a trial on the merits of this issue this would, we submit, be a gross injustice.

But of greater and more far-reaching importance is the fact that other denominations, such as the Presbyterians, Episcopalians, and Methodists are presently engaged in "conversations" contemplating eventual merger of all or some of these denominations under some new, hybrid type of organization, possibly the United Church of Christ. If

this Petition is granted and the cause remanded for a trial on the merits on the issue of departure as to church polity, church officials and lawyers engaged in present merger negotiations will have a caveat to follow meticulously legal procedures in dealing with local churches and their members.

On the other hand, if this Petition is denied, we may suggest that it will be a clear indication to the proponents of any such merger that the rights of individuals in their churches, as heretofore upheld by the courts under the departure doctrine, is a dead issue in American jurisprudence, and that the courts no longer will become involved in any such dispute.

Thus, this case is not merely a dispute between private parties seeking to resolve their petty differences by litigation, but in its present stature, presents questions of great public interest.

CONCLUSION

For the reasons stated above this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

1963 TERM

To Wit: Oct. 9, 1963

No. 38235

THE STATE OF OHIO,
City of Columbus.

KEITH WILSON, *et al.*,
Plaintiff-Appellants,

vs.

WASHINGTON CONGREGATIONAL CHURCH,
Defendant-Appellee.

APPEAL FROM THE COURT OF APPEALS FOR LUCAS COUNTY

This cause, here on appeal as of right from the Court of Appeals for Lucas County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the defendant appellee recover from the plaintiffs appellants its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution, and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

APPENDIX B

In The

COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 190424

KEITH WILSON, *et al.*,

Plaintiffs.

vs

THE WASHINGTON CONGREGATIONAL CHURCH OF TOLEDO, LUCAS COUNTY, OHIO

Defendant.

JOURNAL ENTRY

This day this cause came on to be heard on plaintiffs' motion that conclusions of fact be found separately by the Court from conclusions of law; plaintiffs' one suggested conclusion of fact; defendant's objection to plaintiffs' proposed conclusion of fact and suggestions as to same; and plaintiffs' objections to proposed findings of fact and conclusions of law submitted by defendant; and the oral arguments, briefs and statements of counsel in connection therewith; and the Court being fully advised in the premises, finds that the motion that conclusions of fact be found separately by the Court from conclusions of law should be

and the same hereby is granted to the extent and in the manner hereinafter set forth.

This day this cause further came on to be heard on the petition, answer, supplement to answer, reply, defendant's motion for summary judgment (and the affidavits and exhibits filed in support thereof and in opposition thereto or introduced in evidence at the time of the hearing), the records and briefs in prior litigation (hereinafter referred to), the oral arguments, briefs and statements of counsel, and upon the evidence.

The petition in this action brought by the named plaintiffs as members of defendant Washington Congregational Church alleges that the vote of said church to become a part of the United Church of Christ effected a departure from the traditional doctrine, faith, dogma and procedures formerly held by defendant church as a church of the Congregational Christian faith and order, and as such deprived plaintiffs of their rights in its properties and assets. The petition also objects to the procedure employed in taking such vote. The petition seeks to have the aforesaid vote declared void and to restrain defendant from carrying out the aforesaid vote in any way.

Defendant's answer contains a general denial and affirmative defenses in which it is alleged that issues here sought to be determined have already been adjudicated in two prior class actions in which the plaintiffs here were represented by the class plaintiffs which created an estoppel by judgment and was res judicata as to such issues. It is upon these defenses that defendant moves for summary judgment.

THE COURT BEING FULLY ADVISED IN THE PREMISES, FINDS that the pleadings, affidavits, admissions of the genuineness of papers and documents, and the evidence before the Court, show that there is no genuine issue as to any material fact but only disputed questions of law and that defendant Washington Congregational Church is entitled to judgment as a matter of law.

THE COURT FURTHER AND SEVERALLY FINDS AND SPECIFIES that each of the following facts exists without controversy or is not actually and in good faith controverted, to-wit:

1. An action was heretofore instituted in the Supreme Court of the State of New York, County of Kings, by the Cadman Memorial Congregational Society of Brooklyn and the Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Churches similarly situated, against Helen Kenyon, as Moderator of the General Council of the Congregational Christian Churches of the United States, as defendant. Final judgment in the said action (hereinafter referred to as the "Cadman case") was rendered in favor of said defendant and against said plaintiffs. The decisions in said action are reported at 195 Misc. 124, 95 N. Y. S. 2d 133, rev'd., 279 App. Div. 1015, 1074, 111 N.Y.S. 2d 808 (2d Dept. 1952), aff'd. 306 N.Y. 151, 116 N. E. 2d 481 (1953).

2. An action was heretofore instituted in the United States District Court for the Southern District of New York by the Mayfair Congregational Church of Toledo, Ohio, its minister Angus MacDonald, one of its members, and others, as plaintiffs against Evangelical and Reformed

Church, and others as defendants. Final judgment in that action (hereinafter referred to as the "Mayfair case") was rendered in favor of defendants and against plaintiffs, the decision being reported at 198 Fed. Supp. 677, under the title First Congregational Church and Society of Burlington, Iowa, et al, plaintiffs v. Evangelical and Reformed Church, et al, defendants. (Aff'd. Aug. 1, 1962, C. A. 2d Docket No. 27258).

3. On May 8, 1961, defendant Washington Congregational Church issued a letter to all its members announcing that a majority of such members had voted to approve the Constitution of the United Church of Christ and in favor of Washington Congregational Church becoming a part of it. Said vote was 154 for and 55 against approving such Constitution. The events leading up to the issuance of said letter dated May 8, 1961 by defendant are set forth in Paragraphs 7 to 11 inclusive of defendant's Answer and Appendix A and Appendix B thereto.

4. Upon the filing of the petition in this case a temporary injunction was issued without notice to defendant or any hearing thereon, and service of the same, together with summons in this case, was served upon plaintiff Earl Dew as statutory agent for defendant.

THE COURT CONCLUDES AS MATTERS OF LAW THAT:

I Plaintiffs in the Cadman case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights

and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein, except plaintiffs' objections to the voting procedure employed). Plaintiffs herein are estopped by said judgment from litigating the issues presented herein (except plaintiffs' objections to the voting procedure employed) and said case is res judicata as to such issues.

II. Plaintiffs in the Mayfair case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights and interests in the subject matter of the litigation which included all the rights and interest asserted by plaintiffs herein, (except plaintiffs' objections to the voting procedure employed). Plaintiffs herein are estopped by said judgment from litigating the issues presented herein (except plaintiffs' objections to the voting procedure employed) and said case is res judicata as to such issues.

III. Washington Congregational Church has taken lawful and proper procedure to approve the Constitution of the United Church of Christ and become a part of it and is now a local church of the United Church of Christ.

IV. The vote to approve the Constitution of the United Church of Christ and in favor of defendant, Washington Congregational Church, being a part of it, was in all respects legal and proper and did not involve any change whatsoever in the Constitution of defendant church.

V. The procedure employed by defendant on and prior to May 7, 1961, to secure a vote on approving the Constitution of the United Church of Christ and in favor of defendant church becoming a part of it, was in all respects legal and proper.

VI. The temporary injunction issued upon the filing of this case, without notice to defendant or hearing thereon, ought not to have been granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the temporary injunction heretofore issued in this cause without notice or hearing be and the same is hereby dissolved and terminated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' petition herein be and the same is hereby dismissed with prejudice at plaintiffs' costs and that judgment be and the same hereby is entered for defendant against plaintiffs for such costs.

To each adverse portion of this journal entry the respective parties object and except.

APPENDIX C

IN THE

COURT OF APPEALS OF LUCAS COUNTY, OHIO

KEITH WILSON, *et al.*,
Plaintiffs-Appellants,
v.
WASHINGTON CONGREGATIONAL CHURCH,
Defendant-Appellee.

No. 5654

JOURNAL ENTRY

Filed 4/3/63

This day this cause came on to be heard on plaintiffs' motion for rehearing, and the briefs relating thereto and the Court being fully advised in the premises finds that said motion should be overruled.

This day this cause further came on to be heard as an appeal on questions of law, upon the assignments of error, the bill of exceptions, the transcript and original papers and pleadings from the Court of Common Pleas of Lucas County, and upon the briefs and arguments of counsel for the respective parties, and the Court being duly advised in the premises finds that there was no genuine issue of fact presented incident to the granting of defendant-appellee's motion for summary judgment denying plaintiffs-appellants' prayer for an injunction, and the Court finds that no error prejudicial to plaintiffs-appellants occurred during any of the proceedings herein.

It is, therefore, ORDERED, ADJUDGED and DECREED that the plaintiffs' motion for rehearing be and the same hereby is overruled.

It is further ORDERED, ADJUDGED and DECREED that the judgment of the Court of Common Pleas of Lucas County heretofore entered in this cause be and the same hereby is affirmed, and that defendant-appellee have and recover from plaintiffs-appellants its costs herein expended and that this cause be and the same hereby is remanded to the Court of Common Pleas of Lucas County for execution for defendant-appellee's costs herein.

To each adverse portion of this journal entry, the respective parties object and except.

(s) DEEDS *Judge*

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO

1963 TERM

To Wit: Oct. 9, 1963

No. 38235

THE STATE OF OHIO,
City of Columbus.

KEITH WILSON, *et al.*,
Plaintiff-Appellants,

vs.

WASHINGTON CONGREGATIONAL CHURCH,
Defendant-Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR LUCAS COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Swartzbaugh, Meor & Longthorne.

APPENDIX E

In The

COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 190424

KEITH WILSON, *et al.*,

Plaintiffs

vs

THE WASHINGTON CONGREGATIONAL CHURCH OF TOLEDO, LUCAS COUNTY, OHIO

Defendant.

PETITION

1. Plaintiffs are members in good standing of the defendant, Washington Congregational Church.

2. Defendant is a non-profit corporation organized and existing under and by virtue of the laws of the State of Ohio and a member of the Congregational Christian Fellowship with its church building and place of worship in the City of Toledo, Ohio.

3. The General Synod of the United Church of Christ is an ecclesiastical body formed in 1957 for the purpose of merging the Evangelical and Reformed Church and the Congregational Christian Churches of the United States into the United Church of Christ under a Constitution approved by the General Synod of said United Church of Christ on July 6-8, 1960.

4. Under said Constitution a local church of the Congregational Christian fellowship becomes a local church of the United Church of Christ by approving said Constitution and/or voting to become a part of it. The United Church of Christ is composed of local churches, associations, conferences and the General Synod. Said Associations, Conferences, and General Synod are ecclesiastical bodies. By becoming a part of said United Church of Christ a local church thereof is amenable to said ecclesiastical bodies under said Constitution which expressly provides that actions by, or decisions or advice emanating from, the General Synod, a Conference or an Association, should be held in the highest regard by every local church.

5. Congregational Christian Churches have a heritage and tradition going back more than four hundred years. There are currently approximately six thousand Congregational Christian churches in the United States. Under the congregational system heretofore followed by said churches, each church owns its property, and so far as church government is concerned is autonomous and owes no fealty or obligation to any higher ecclesiastical authority. There is no overall constitution for churches of said fellowship, written or otherwise.

6. In conformity with the said tradition of the Congregational Christian Churches and pursuant to the statutes of Ohio defendant adopted a Constitution and By-laws for the conduct of the business of the church which, at all times mentioned herein, was in full force and effect. Said Constitution and By-laws contained the following provisions, to wit:

a) ARTICLE II **Government and Fellowship**

The government of this church is vested in its members, who exercise the right of control in all its affairs. It is amenable to no other ecclesiastical body, but it accepts the obligations of mutual counsel, comity and co-operation involved in the free fellowship of the Congregational Churches and pledges itself to share their common aims and work. This church is in direct fellowship with the Toledo Association, the Congregational Conference of Ohio, and the National Council of Congregational Churches of the United States; and with all churches which seek to promote the Kingdom of our Lord, Jesus Christ.

b) ARTICLE XI **Amendments**

This Constitution may be amended by a two-thirds vote of the members present at any Annual Meeting of the Church or at a meeting specially called for that purpose, proposed amendment being inserted in the call. But no change shall be made in Article II except at an Annual Meeting and by a three-fourths vote of the members of the Church present and voting, said proposed change having been laid before the Church in writing at a business meeting not less than one month before the time of the proposed action and read from the pulpit on the Lord's Day next succeeding the proposal.

c) ARTICLE VIII **Meetings**

Public services shall be held each week on the Lord's Day. The Lord's Supper shall be observed at such season as the Pastor and the Board of Deacons shall determine. The annual meeting of the

Church shall be held on the Friday following the second Sunday in January, to hear the yearly reports of the officers, organizations and boards, to elect officers, to transact business and to adopt plans for the new year. Special meetings of the Church may be called by the Minister or the Moderator at the request of the Church Council or any of the boards, or on the written request of five adult members, specifying the objects thereof. Such notice shall be read at the public service on the Lord's Day next preceding the day fixed for such meeting. No special meeting shall be held on the same day on which the notice is given.

A quorum at any meeting of the Church shall consist of 50 voting members. A majority vote of the members shall ordinarily be decisive. The calling of a minister, to be done usually upon the recommendation of not less than two thirds of the Church Council, shall require a two-thirds vote of all voting members of the Church present at a meeting especially called for this purpose.

7. By letter dated May 8, 1961, the defendant church, announced that a majority of the members of the defendant church voting had voted "yes" on ballots on which the following appeared to-wit:

"I approve the constitution of the United Church of Christ and thus favor Washington Congregational Church being part of it."

8. Plaintiffs say that any such purported and pretended vote was not taken in accordance with the express mandatory provisions of the Constitution and By-laws of defendant church and is invalid, without legal force or effect.

and should be vacated, set aside, held for naught, and expunged from the church records for the following reasons, to-wit:

a) Article II of the Constitution and By-laws of the defendant church provides that it is "amenable to no other ecclesiastical body". A vote to approve the constitution of the United Church of Christ and to make the defendant church "a part of it" is a vote to amend Article II of the Constitution and By-laws of defendant church. Such a vote can only be taken at an annual meeting and by a three-fourth vote of the members of the church present and voting.

b) No such vote took place at a meeting of the church at which a quorum was determined or declared to be present.

c) There is no provision in the Constitution and By-laws of defendant church for taking a secret vote outside of a regularly constituted meeting of members at which a quorum is present.

d) There is no provision in the Constitution and By-laws which permits the accumulation of votes of members on any subject taken from time to time and outside of a meeting of members duly called in accordance with said Constitution and By-laws.

e) There is no provision in the Constitution and By-laws for absentee ballot, or voting by mail or proxy.

f) There is no provision in the Constitution and By-laws for ratification of a vote of members taken other than in accordance with the provisions thereof.

9. Plaintiffs say that the members of defendant church were advised by letter dated April 19, 1961 that the voting

to approve the Constitution of the United Church of Christ and "to become a part of it" would take place on April 30, 1961. The only business to come before the members at the meeting held following sabbath service on that date was the election of a trustee. Prior to and following sabbath service on said date members who wished to vote were required to go to a room adjacent to the foyer of the defendant church, sign their names to a list of the members voting, mark a ballot and deposit the same in a box through a slot.

10. Plaintiffs further say that the same procedure was followed the following Sunday, May 7, 1961 except the only matter of business presented to the meeting following sabbath service was whether the voting procedure was "fair and acceptable". No vote was taken at said meeting on the approval of the Constitution of the United Church of Christ or that the defendant church should become a part of it.

11. Plaintiffs are informed, believe, and therefore allege on information and belief that ballots were furnished to members requesting them to enable said members to vote by mail, and that such votes have been counted and included in the total vote of all persons claimed to have voted on or before May 7, 1961.

12. Plaintiffs further say that said pretended vote to make the defendant church a part of the United Church of Christ and subject to the overall constitution of said church is a vote involving matters of fundamental and traditional doctrine, faith, dogma, and procedures and a departure from those theretofore held and followed by defendant church, and would deprive these plaintiffs, as a faithful minority, of their rights in the properties and assets of

the defendant church under the Constitution of the United States and the laws and Constitution of the State of Ohio.

13. Plaintiffs say that timely objection was made to the said voting procedures before any announcement was made of the results thereof.

14. Plaintiffs further say that there is a genuine controversy between the parties hereto and that the plaintiffs are without an adequate remedy at law; that said pretended vote should be held and declared to be without legal force or effect and void; and that the defendant church, its officers, trustees, agents, and pastor should be restrained and enjoined from expending any funds of defendant church to carry out the scheme and purpose to make the defendant church a part of the United Church of Christ and subject to the constitution of that church, its Associations, Conferences, and General Synod.

WHEREFORE, plaintiffs pray as follows:

1. For a judgment finding and declaring said pretended vote on said proposed merger to be without legal force and effect and wholly void;

2. For a judgment finding and declaring that a vote of defendant church to approve the constitution of the United Church of Christ and to become a part of it involves matters of fundamental and traditional doctrine, faith, dogma, polity and procedures;

3. For a temporary order restraining and enjoining the defendant church, its officers, trustees, minister, and

agents from expending any moneys of defendant church to carry out or put into effect or maintain said proposed merger from its general funds or to transfer or convey any assets of defendant church to said United Church of Christ or to any Board or instrumentality thereof, and that on the final hearing hereof that said order be made permanent.

4. For such other and further relief to which plaintiffs may be entitled, and for their costs herein.

APPENDIX F

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE IN CHANCERY

HELEN JOAN BERKAW, GRACE PFAFF, FRANK C. SMITH and ROY L. STEPHENS, JR., *Plaintiffs*	)	
vs.	)	No. 611-604
MAYFLOWER CONGREGATIONAL CHURCH, a Michigan corporation, *Defendant*	)	

MOTION TO DISMISS

Now comes the above named defendant by Dykema, Wheat, Spencer, Goodnow and Trigg, its attorneys, and makes this motion to dismiss the above entitled cause and the plaintiff's bill of complaint on the following grounds:

1. Plaintiffs are barred from maintaining this action by reason of two prior adjudications by which the matters raised in the complaint herein have been finally and conclusively determined against them.

a. By the final judgment in a certain action commenced on or about April 18, 1949 in the Supreme Court, State of New York, County of Kings, entitled "Cadman Memorial

Congregational Society of Brooklyn and The Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Churches similarly situated plaintiffs, against Helen Kenyon as Moderator of the General Council of the Congregational Christian Churches of the United States, defendant." The decisions in said action are reported at 197 Misc. 124, 95 N. Y. Supp. 2d 133, reversed 279 App. Div. 1015 (2d Dept. 1952), aff'd 306 N.Y. 151, 116 N.E. 2d 481 (1953). * * * * * * *

b. By a certain action commenced in June, 1957 in the United States District Court for the Southern District of New York entitled "First Congregational Church and Society of Burlington, Iowa, et al., plaintiffs v. Evangelical and Reformed Church, et al, defendants", . . . The plaintiffs herein, having been members of the class represented in the Federal District Court action, are concluded by the adjudications made therein on principles of full faith and credit and judicial comity.

. . . . . .

This motion is based upon the files and records in this cause and on the affidavits of Loren T. Wood and Louis E. Taylor attached hereto.

Dated: July 18, 1961

DYKEMA, WHEAT, SPENCER, GOODNOW & TRIGG
Attorneys for Defendant
2746 Penobscot Building
Detroit 26, Michigan